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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/525,224
Filing Date: February 22, 2005
Appellant(s): GARCIA ET AL.

RAJA N. SALIBA
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5/11/09 appealing from the Office action mailed 9/10/08.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

| | | |
|-----------|---------------|--------|
| 4,252,507 | KNICKERBOCKER | 2-1981 |
| 6,398,079 | GARCIA ET AL. | 6-2002 |

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 1, 2, 4-8 and 14-19 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Knickerbocker (4,252,507).

Knickerbocker discloses, in figs.1, a fluid dispenser comprising a fluid reservoir C and dispenser member comprising a body 26 defining a chamber; an actuator rod 22; a peripheral bearing collar including a gasket (G) coming into abutment at least indirectly against an edge of an opening of the fluid reservoir; wherein the axial height between the bottom face of the collar and the top end 23 of the actuator rod is substantially equal to the axial height between the bottom face of the collar and the bottom (the position where the ball 52 sitting on) of the body and substantially equal to the axial height of a neck of the reservoir; a dispensing head 16 mounted on the top of the rod; wherein the reservoir C including a neck defining an opening defining a free top end forming an annular edge; the axial height between the bottom face of the collar and the top end 23 of the actuator rod is substantially equal to the axial height between the bottom face of the collar and the bottom of the body and substantially equal to the axial height of a neck of the reservoir; and the bottom end of the body 26 being situated in the neck.

Although Knickerbocker does not disclose the height and diameter of claimed components of the fluid dispenser of as claimed, it would have been obvious to one having ordinary skill in the art at the time the invention was made to make the height and diameter of claimed components of the fluid dispenser of

Knickerbocker as claimed, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering of the optimum or workable ranges or values involves only routine skill in the art. In re Aller, 105 USPQ 233.

And it would also have been obvious matter of design choice to make the height and diameter of claimed components of the fluid dispenser of Knickerbocker as claimed, since such modification would have a mere change in the size/proportion of components. A change in size/proportion is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

The Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not performed differently than the prior art device, the claimed device was not patentably distinct from the prior art device. In Gardner v. TEC Systems, Inc., 725 F.2d 1338, 220 USPQ 777 (1984).

2. Claims 1, 2, 9, 10 and 20-23 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Garcia et al. (6,398,079) in view of Knickerbocker (4,252,507).

Garcia et al. disclose, in fig.1, a fluid dispenser comprising a fluid reservoir and dispenser member comprising a body 10 defining a chamber; an actuator rod 46; a peripheral bearing collar 511 including a gasket coming into abutment at least indirectly against an edge of an opening of the fluid reservoir; wherein the axial

height between the bottom face of the collar and the top end of the actuator rod 64 is substantially equal to the axial height between the bottom face of the collar and the bottom 120 of the body; a dispensing head 4 mounted on the top of the rod; a cover hoop 5; and a piston 48 sliding in a top section disposed entirely outside of the neck of the reservoir.

Garcia does not disclose the neck of the reservoir having an axial height being equal to the axial height between the bottom face of the collar and the top end of the actuator rod, and the axial height between the bottom face of the collar and the bottom of the body; and the bottom end of the body being situated in the neck.

Knickerbocker teaches a neck of a reservoir having an axial height being equal to the axial height between a bottom face of a collar and a top end of the actuator rod, and an axial height between the bottom face of the collar and the bottom of the body; and the bottom end of the body being situated in the neck (see paragraph 1 of the rejection above).

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the dispenser member of Garcia to use with a fluid reservoir having a neck comprising an axial height as claimed, in view teaching of Knickerbocker, in order to facilitate pumping the fluid dispenser by grasping on the portion of the neck or the reservoir.

Although Garcia et al. in view of Knickerbocker does not disclose the height and diameter of claimed components of the fluid dispenser of as claimed, it would

have been obvious to one having ordinary skill in the art at the time the invention was made to make the height and diameter of claimed components of the fluid dispenser of Garcia et al. in view of Knickerbocker as claimed, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering of the optimum or workable ranges or values involves only routine skill in the art. In re Aller, 105 USPQ 233.

And it would also have been obvious matter of design choice to make the height and diameter of claimed components of the fluid dispenser of Garcia et al. in view of Knickerbocker as claimed, since such modification would have a mere change in the size/proportion of components. A change in size/proportion is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

The Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not performed differently than the prior art device, the claimed device was not patentably distinct from the prior art device. In Gardner v. TEC Systems, Inc., 725 F.2d 1338, 220 USPQ 777 (1984).

(10) Response to Argument

In regard to claim 1, 2,4-8 and 14-19 as being rejected by Knickerbocker (4,252,507) under 35 U.S.C 103(a), appellant argues that Knickerbocker does not disclose the axial height between the bottom face of the collar and the top end of the actuator rod is substantially equal to the axial height between the bottom face of the collar and the bottom end of the body and heights are all about 7 mm to 9 mm and wherein the axial height of the neck is about 7 mm to 9 mm. Knickerbocker does not indicate fig. 1 made to scale nor does it describe any quantification of the dimensions of the device in the specification; therefore, fig. 1 can not be considered as disclosing the claimed dimensions.

However, that is not found convincing because drawings can be used as prior art (MPEP 1221.04 and 2125). Drawing and pictures can anticipate claims if they clearly show the structure which is claimed, in re Mraz, 455 f.2d 1069, 173 USPQ 25 (CCPA 1972). Knickerbocker discloses, in fig. 1, the axial height between the bottom face of the collar 12 and the top end 23 of the actuator rod 22 is substantially equal to the axial height between the bottom face of the collar and the bottom of the body (at the position where the ball 52 sitting on) and substantially equal to the axial height of a neck of the reservoir; and the bottom end of the body 26 being situated in the neck. Although Knickerbocker does not disclose the height and diameter of claimed components of the fluid dispenser of as claimed, it would have been obvious to one having ordinary skill in the art at

the time the invention was made to make the height and diameter of claimed components of the fluid dispenser of Knickerbocker as claimed, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering of the optimum or workable ranges or values involves only routine skill in the art. In re Aller, 105 USPQ 233.

And it would also have been obvious matter of design choice to make the height and diameter of claimed components of the fluid dispenser of Knickerbocker as claimed, since such modification would have a mere change in the size/proportion of components. A change in size/proportion is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

The Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not performed differently than the prior art device, the claimed device was not patentably distinct from the prior art device. In Gardner v. TEC Systems, Inc., 725 F.2d 1338, 220 USPQ 777 (1984).

In regard to claims 1, 2, 9, 10 and 20-23 as being rejected under 35 U.S.C. 103(a) over Garcia et al. (6,398,079) in view of Knickerbocker, appellant argues that Garcia et al. does not indicate that fig. 1 is made of scale nor does it describe any quantification of the dimensions of the device in the specification;

therefore, fig. 1 can not be considered as disclosing the claimed dimensions. And it would not be obvious to combine Knickerbocker with Garcia et al. to create the claimed relationship between the dimensions.

However, that is not found convincing because drawings can be used as prior art (MPEP 1221.04 and 2125). Drawing and pictures can anticipate claims if they clearly show the structure which is claimed, in re Mraz, 455 f.2d 1069, 173 USPQ 25 (CCPA 1972).

Garcia et al. disclose, in fig.1, a fluid dispenser comprising a fluid reservoir and dispenser member comprising a body 10 defining a chamber; an actuator rod 46; a peripheral bearing collar 511 including a gasket coming into abutment at least indirectly against an edge of an opening of the fluid reservoir; wherein the axial height between the bottom face of the collar and the top end of the actuator rod 64 is substantially equal to the axial height between the bottom face of the collar and the bottom 120 of the body; a dispensing head 4 mounted on the top of the rod; a cover hoop 5; and a piston 48 sliding in a top section disposed entirely outside of the neck of the reservoir.

Garcia does not disclose the neck of the reservoir having an axial height being equal to the axial height between the bottom face of the collar and the top end of the actuator rod, and the axial height between the bottom face of the collar and the bottom of the body; and the bottom end of the body being situated in the neck.

Knickerbocker teaches a neck of a reservoir having an axial height being equal to the axial height between a bottom face of a collar and a top end of the actuator rod, and an axial height between the bottom face of the collar and the bottom of the body; and the bottom end of the body being situated in the neck.

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the dispenser member of Garcia to use with a fluid reservoir having a neck comprising an axial height as claimed, in view teaching of Knickerbocker, in order to facilitate pumping the fluid dispenser by grasping on the portion of the neck or the reservoir.

Although Garcia et al. in view of Knickerbocker does not disclose the height and diameter of claimed components of the fluid dispenser of as claimed, it would have been obvious to one having ordinary skill in the art at the time the invention was made to make the height and diameter of claimed components of the fluid dispenser of Garcia et al. in view of Knickerbocker as claimed, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering of the optimum or workable ranges or values involves only routine skill in the art. In re Aller, 105 USPQ 233.

And it would also have been obvious matter of design choice to make the height and diameter of claimed components of the fluid dispenser of Garcia et al. in view of Knickerbocker as claimed, since such modification would have a mere change in the size/proportion of components. A change in size/proportion is

generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

The Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not performed differently than the prior art device, the claimed device was not patentably distinct from the prior art device. In Gardner v. TEC Systems, Inc., 725 F.2d 1338, 220 USPQ 777 (1984).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/LIEN TM NGO/
Primary Examiner, Art Unit 3754

Conferees:

/Kevin P. Shaver/
Supervisory Patent Examiner, Art Unit 3754

/Len Tran/
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